

# ARIZONA

## REAL ESTATE BULLETIN

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## Bill Lucas named director of Tucson office

Bill Lucas, who has served as Deputy Director of the Department's Subdivision Division since 1996, has been named Director of Operations of the Tucson Office. He took over his new duties on February 15.

Catherine England, who accepted the position in December, resigned due to personal reasons.

Mr. Lucas joined the Department as an investigator in 1985. A year later he became a real estate representative for the Subdivisions Division. He was promoted to deputy director of the division in 1996.

Prior to joining the Department, he was a real estate broker, and from 1972 to 1977 he was the Mayor of Eastlake, Ohio.

"Bill's years of experience with the Department and his extensive knowledge of subdivision and real estate law make him an excellent choice to head our Tucson operation," said Commis-



*Bill Lucas*

sioner Jerry Holt. "I know that the real estate community in Tucson will be well served."

## Role of Real Estate Advisory Board to be addressed at March meeting

The Arizona Real Estate Advisory Board will explore the Board's role at a regularly scheduled meeting at the Prescott Resort hotel beginning at 1:15 p.m. on March 11.

Chairman Paul Lindsey said he has structured the meeting to discuss the Board's history and "what we do now."

The Board will conduct an open discussion from 1:15 to 2:30 p.m. during which time it will listen to suggestions from the public. The regular business meeting will begin at 2:45 p.m.

The Real Estate Advisory Board was established by A.R.S. § 32-2104. It comprises seven members appointed by the Governor. Two must have been Arizona real estate brokers for five or more years; two members must be primarily engaged in real property subdivision; the remaining three members are from the public at large.

The Board's charge is to "provide the Commissioner with such recommendations as it deems necessary and beneficial to the best interests of the public. The board shall also provide

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## Commissioner's Rule Package approved

A substantial revision of Title 4, Chapter 28, Arizona Administrative Code (the Commissioner's Rules) became effective February 3.

In rewriting the Commissioner's Rules, the Department has tried to make them more clear and concise and easier to understand.

Here are some of the provisions of the new Rules which affect most licensees:

### Continuing Education Requirements

Of interest to most licensees is a change in mandatory continuing education hours required for license renewal. Gone is the requirement for three hours of education in environmental issues. The new mandated hours are three hours each in the following categories:

- Agency Law
- Contract Law
- Commissioner's Standards
- Real Estate Legal Issues
- Fair Housing

In addition, those wishing to renew a license must attend nine additional hours of classes in elective subjects. The Department will accept only three hours of credit in "self-improvement" courses as part of the 24 hours required for license renewal.

### Late Renewal Fees

Under the new rules, those who apply for license renewal after their licenses have expired will be charged a graduated late-renewal fee. Salespersons will pay a \$10-per-

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# Are document preparation fees legal?

By Dan Klobberdanz

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It seems that it is becoming more common in the real estate industry for real estate licensees (salespersons or brokers) to provide contracts or forms to clients and others in return for money or other consideration. We have seen this occur in two situations. First, we have seen an licensee charge money for the preparation of a contract or other form, even though that licensee is not representing one of the parties in that transaction. Secondly, we have seen licensees who are representing a party in a transaction charge extra fees for "contract preparation," or something similar. As explained below, both of these types of practices violate Arizona law.

## When Is a real estate licensee "practicing law"?

We must start with the basic premise that under Arizona law, only one who is a licensed attorney may "practice law" in this State. Rules of the Supreme Court, Rule 31(a)(3). The practice of law is difficult to define, and has been described by the Arizona Supreme Court as follows: "... those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute 'the practice of law.'"

*State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz 76, 87, 366 P.2d 1, 9 (1961), supplemented, 91 Ariz. 293, 371 P.2d 1020 (1962).

In the State Bar case, the court held that such acts include the direct or indirect giving of advice relative to legal rights and liabilities. Obviously, this definition leaves open many unanswered questions. We can safely assume, however, that the preparation of a lease or purchase contract is "practicing law" under the above quoted definition.

As a result of the court case cited above, in 1962 the people of Arizona elected to change the State Constitution to create an important exception for real estate licensees to the general rule cited above. This change was promoted by the real estate industry to give real estate brokers the right to "practice law." This change is contained in the Arizona Constitution at Article XXVI, Section 1, which provides as follows:

§ 1. Powers of real estate broker or salesman

Section 1. Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department *when acting in such capacity as broker or salesman for the parties, or licensee for one of the parties* to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, *without charge*, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale. [Emphasis added.]

By virtue of this constitutional change, all real estate licensees have the right to prepare any instruments incident to the sale of real property, including notes and deeds of trust, purchase contracts and leases. Based upon the language itself, it is apparent that real estate licensees have the right to draft or fill out and complete documents only if such documents are incidental to a transaction in which the licensee is acting as a broker or salesperson for at least one of the parties. The language itself also limits the licensee's right to practice law to situations where the services are performed "without charge."

## The Attorney General's Opinion

In 1963, the Arizona Attorney General issued an opinion which specifically dealt with an licensee's right to prepare real estate instruments, and to charge for such instruments. Attorney General Opinion, 6366L (R257), May 8, 1963.

With regard to the issue as to whether or not an licensee can charge a client for such services, the Attorney General concluded as follows:

Accordingly, it is the opinion of this office that a real estate broker or salesman when acting in such capacity or as licensee for one of the parties to a particular real estate transaction may *with respect to that transaction*: (a) draft or fill in and complete instruments incident thereto, but (b) this right, if exercised, must be accomplished without charge to the parties. [Emphasis in original.]

With regard to the issue as to whether or not an licensee can prepare instruments when he or she is not acting as an licensee for at least one of the parties, the Attorney General concluded as follows:

The only effect of Article XXVI was to confer the limited right upon brokers and salesmen to prepare instruments incidental to a transaction in which they have been employed without receiving a fee for such preparation. . .

. Accordingly, it is the opinion of this office that a real estate broker or salesman who is not an active member of the state bar is engaged in the unauthorized practice of law and violates the criminal provisions of A.R.S. § 32-261 punishable by imprisonment in the county jail for [sic] not to exceed six months, by a fine not exceeding three hundred dollars, or both (A.R.S. § 13-1645) when he drafts or fills in and completes instruments relating to a real estate transaction with which transaction he is unconnected as a broker, salesman or licensee.

With regard to the latter part of the quote relating to the criminal provisions of A.R.S. § 32-261, it should be noted that this practice of law statute (A.R.S. § 32-261) was repealed by the Legislature in 1982. The unauthorized practice of law is now governed by the Arizona Supreme Court Rules, rather than by statute, so such criminal provisions no longer apply.

Although the Attorney General's opinion does not establish a legal precedent, such as a reported court case from our appellate courts, the opinion is nonetheless important for two reasons. First, the opinion appears to be correctly analyzed, and there have been no changes in the law since 1963 which would alter the conclusion of the opinion (other than the reference to A.R.S. § 32-261). Secondly, because the Attorney General is the legal counsel for the Department of Real Estate, the opinion is likely to be relied upon by the ADRE in any administrative action against a licensee who commits the unauthorized practice of law.

Only one reported court case in Arizona has dealt with the issue of a real estate licensee's right to practice law. *Morley v. J. Pagel Realty and Insurance*, 27 Ariz.App. 62, 550 P.2d 1104

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Jerry Holt

## News From The Commissioner

**A**fter more than two years of work by Department staff members, stakeholders and members of the Governor's Regulatory Review Council and the Attorney General's office, I am pleased to announce that the new Commissioner's Rules went into effect February 3.

As required by law, the Department completed a five-year Rules review in 1996. Input regarding desirable changes to the Rules came from a variety of sources including the Arizona Association of Realtors®, the Real Estate Educator's Association, the Arizona Cemetery Association, numerous home builders, developers, title companies and escrow companies.

There simply is not enough space here to list all of those Department employees and those outside the Department who put so much time and effort into what is in reality a total redesign of the Commissioner's Rules. All of you have my sincere thanks.

In overhauling the Rules, our intent was to eliminate Rules which have been superseded by statute or which have become obsolete, to add a few Rules which formerly were addressed by Substantive Policy Statements or required by new statutes, and to rewrite virtually every Rule to make it more concise and easier to understand.

Here are some of the more important changes I'd like to call to your attention:

### Licensing Time Frames

Legislation enacted in 1997 required the Department to establish rigid time-frames in which it

processes license applications and renewal applications. A new Rule explains these time frames in a way I believe everyone will understand.

### Unlicensed activity

In the past, licensees who disclosed that they had conducted business while their licenses were expired had to enter into a Consent Order in which they offered to refund all commissions received while unlicensed.

This held up license renewal for as long as several weeks, even months.

We felt this was a repressive situation which punished licensees unnecessarily when no real harm had been done to the public.

Now, a licensee simply checks "yes" or "no" in response to a question asking whether they conducted any transactions after license expiration. The Department then issues a letter to memorialize the facts, a letter which becomes a permanent part of the licensee's file. A copy of the letter is sent to the licensee's designated broker. Meanwhile, the application for renewal is processed just as quickly as for those who have not conducted unlicensed activity.

No further action is taken unless the Department receives a formal complaint concerning a transaction which took place while the license was expired.

In addition, the Department may take disciplinary action against the licensee if a second instance of unlicensed activity occurs.

### New late-renewal fees

On an average, 14 percent of all licensees can't manage to renew

their licenses on time.

A new rule addresses this problem with escalating renewal fees. Renew on time, and the fee is the same as before: \$60 for salespersons, \$125 for brokers.

If you let your license expire then renew during the first month after expiration, you'll pay a \$10 late fee if you're a salesperson, and a \$20 late fee if you're a broker.

The fee will escalate at a rate of \$10 per month for salespersons and \$20 per month for brokers for each additional month (up to the statutory maximum shown in the table below) after expiration. It works like this:

Month after expiration	Salesperson	Broker
1st	\$10	\$20
2nd	20	40
3rd	30	60
4th	40	80
5th	50	100
6th through 12th	60	120

The Department, although not required by law to do so, mails renewal forms to licensees approximately 60 days before license expiration. You may renew your license up to 90 days before it expires, and early renewal does not affect the expiration date of your new license.

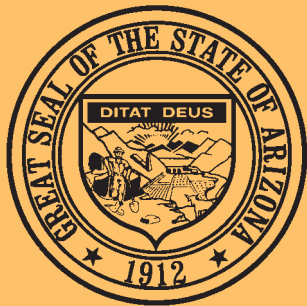
### Continuing education

Originally, the Department intended to eliminate the requirement for mandated continuing education in the areas of fair housing and environmental matters. Many of you felt that mandated fair-housing continuing education is necessary, so it has been retained. A renewal applicant still needs 24 hours of continuing education, including three hours in each of the following categories:

- Agency law
- Contract law
- Commissioner's standards
- Real estate legal issues
- Fair housing

The new Rules will be included in the Arizona Real Estate Law Book to be published soon. Meanwhile, you may obtain a copy from our Web site at [www.adre.org](http://www.adre.org).





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## 1999 Schedule of Broker Audit Clinics

A.R.S. § 32-2136 requires all newly licensed real estate brokers to attend a Broker Audit Clinic presented by the Department within 90 days of issuance of their original broker's license. ***Effective July 21, 1997, all designated real estate brokers must also attend a Broker Audit Clinic within 90 days after becoming a designated broker unless the broker has attended an audit clinic during the broker's current licensing period.*** All designated brokers shall attend a broker audit clinic once during every four-year period after their initial attendance.

Seating is limited and reservations are required. To make a reservation for a Phoenix clinic, call the Department's Customer Services Division at (602) 468-1414, extension 100. In Tucson, call (520) 628-6940. Those who fail to make reservations will be turned away if seating is not available. Brokers who attend will receive three hours of continuing education credit in the category of Commissioner's Standards.

The following is the schedule of Clinics to be offered in Phoenix and Tucson during the remainder of 1999. Additional clinics may be scheduled from time to time at other locations in Phoenix and in rural areas.

#### PHOENIX

Industrial Commission Auditorium  
800 W. Washington

#### 1 p.m. to 4 p.m.

March 18  
April 15  
May 20  
June 17  
July 15  
August 19  
September 16  
October 21  
November 18  
December 16

#### TUCSON

State Office Building  
400 W. Congress  
Room 222

#### 1 p.m. to 4 p.m.

March 17  
April 21  
May 19  
June 16  
July 14  
August 18  
September 15  
October 20  
November 17  
December 15

#### BULLHEAD CITY BROKER AUDIT CLINIC

A Clinic will be held in Bullhead City from 9 a.m. until noon on Saturday, April 17. To register, call Bobbie Denham at 520/758-6922.

## Current license must now be submitted with sever or change form

The new Commissioner's Rules, which became effective February 3, now require that all sever or change forms

submitted by employing or designated brokers be accompanied by the affected person's current real estate license.

The mission of the  
Arizona Department of Real Estate  
is to safeguard and promote the public interest  
through timely and capable assistance,  
fair and balanced regulation,  
and sound and effective education.

## ADMINISTRATIVE ACTIONS

### REVOCATIONS

#### H-1970

**Lisa Lyn Nicodemus  
Sedona**

DATE OF ORDER: December 8, 1998

FINDINGS OF FACT: In June 1998, Petitioner filed an application for renewal of her real estate salesperson's license in which disclosed that she had been convicted of aggravated DUI (a felony), driving on a suspended license and endangerment of a police officer since the date of issuance or renewal of her salesperson's license. She failed, however, to notify the Commissioner within 10 days of her conviction.

Petitioner had been convicted of DUI and leaving the scene of an accident in January, 1997.

As a result of the conviction, Petitioner was incarcerated in the county jail for 60 days and placed on probation for three years commencing September 9, 1997.

VIOLATIONS: Based on her conduct, Petitioner is not a person of good character, in violation of A.R.S. § 32-2153(B)(7). In failing to notify the Commissioner of her conviction within 10 days, Petitioner violated A.A.C. R4-28-301(C)(1). Furthermore, Petitioner is ineligible for license renewal because she is still serving a period of probation according to the provisions of A.R.S. § 32-2130(E).

DISPOSITION: Petitioner's real estate salesperson's license is revoked.

#### H-1911

**Donna L. Ivie  
Phoenix**

DATE OF ORDER: December 29, 1998

FINDINGS OF FACT: As the result of an Administrative Hearing, a Commissioner's Order was issued on December 17, 1997 suspending Respondent's real estate salesperson's license for one year and imposing a civil penalty in the amount of \$2,500.

Respondent has not paid any part of the civil penalty nor has she made any effort to deal with the Department regarding payment. Respondent failed to appear at an Administrative Hearing held November 8, 1998, regarding her failure to pay the penalty.

DISPOSITION: Respondent's real estate salesperson's license is revoked. Respondent to pay a civil penalty in the amount of \$1,000.

### SUSPENSIONS

#### H-1973

**Isaac R. Johnson  
Phoenix**

DATE OF ORDER: January 21, 1999

FINDINGS OF FACT: In March 1997, Respondent file an application for renewal of his real estate broker's license in which he failed to disclose that a civil judgment had been issued

against him in the amount of \$22,427.24 in connection with a real estate transaction.

Respondent subsequently filed for bankruptcy and the bankruptcy court discharged Respondent's debt for the civil judgment. In September 1997, a Superior Court judge ordered payment of \$20,000 from the Real Estate Recovery Fund to compensate the person who received the judgment.

As an aggravating factor, in December 1997, Respondent entered into a Consent Order with the Department wherein he admitted that he failed to properly maintain management-related contracts. His license was suspended for one month.

As an additional aggravating factor, in 1982 the Department suspended Respondent's broker's license for one month because he had failed to maintain complete records, failed to properly produce requested records and commingled trust funds.

VIOLATIONS: Respondent violated A.R.S. §§ 32-2153(B)(1) and (B)(3) by failing to report the judgement entered against him. He filed a false and misleading application, in violation of A.R.S. § 32-2153(B)(1). In failing to disclose the judgment, he made a substantial misrepresentation, in violation of A.R.S. § 32-2153(B)(3).

DISPOSITION: Respondent's real estate broker's license is suspended for 12 months. Respondent to pay a civil penalty in the amount of \$1,000.

### CIVIL PENALTIES

#### H-1954

**John E. Kereny and Paramount Realty, Inc.  
Phoenix**

DATE OF ORDER: November 23, 1998

FINDINGS OF FACT: Paramount Realty was licensed as a corporate real estate broker at all times material to this case. Paramount's license expired on March 31, 1997. Paramount currently does not have a valid corporate real estate license.

Kereny was licensed as a real estate broker at all times material to this case. Kereny was the designated broker for Paramount. Kereny's real estate broker's license expired on March 31, 1997. Kereny currently does not have a valid real estate broker's license.

Milton Sky was the owner and president of Paramount at all times material to this case. Sky was originally issued a real estate salesperson's license on November 13, 1985. On July 3, 1990, a Consent Order was entered by the Department against Sky for trust account violations. Sky's real estate salesperson's license was ordered revoked for a period of five years from July 3, 1990 through July 2, 1995.

The Consent Order further stated that Paramount could remain in business only under certain circumstances, including that Sky would

have no authority to deposit or withdraw funds from or be a signatory on any real estate trust account.

In December 1991, Lorraine B. Costa entered into a written property management agreement with Paramount to manage property located in Scottsdale. She testified that she did not receive rental proceeds for the months of January, February March and April, 1996. She also testified that she did not receive timely monthly account statements for those months.

She testified that she repeatedly telephoned Sky about the missing rental proceeds and statements from January to April, 1996. She testified that Sky would always reply that the check was in the mail. Eventually, Sky failed to return her telephone calls. She also testified that Sky claimed that no proceeds were owed for January 1996 because a refrigerator had to be replaced at the rental property. Costa testified that the refrigerator was a used refrigerator worth less than one month's rental proceeds.

On May 17, 1996, Costa sent a letter to Paramount canceling the property management agreement. On May 21 she filed a complaint with the Department against Paramount. Shortly thereafter, Kereny telephoned Costa promising restitution for the missing rental proceeds and a security deposit. Costa testified that Kereny stated he only recently became aware of the problems at Paramount, and that he mistakenly relied on Sky to properly manage Paramount.

Costa testified that she still has not received the rental proceeds or the security deposit. She calculated that Paramount owes her approximately \$1,339.25.

James B. Bleakley and Paramount entered into a property management agreement to manage property in Phoenix. Bleakley testified that he did not receive his monthly rental proceeds and monthly statements on a timely basis. He further testified that the property was poorly managed. On November 21, 1995, Bleakley sent a certified letter to Paramount canceling their property management agreement and demanding payment of the July, September, October and November 1995 rental proceeds. Bleakley testified that Sky refused to accept the letter.

On January 16, 1996, Bleakley wrote a letter to Kereny demanding return of the security deposit and three months' rental proceeds. On June 23, 1996, Bleakley wrote another letter again demanding payment. Bleakley testified that he never received the funds.

On October 22, 1996, Bleakley received a civil judgment in Justice Court against Paramount in the amount of \$2,016.96. Bleakley stated that Kereny testified against Paramount at this trial. Bleakley testified that this judg-

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ment still has not been satisfied.

In early 1991, Glen C. Higgins entered into a property management agreement with Paramount to manage property located in Glendale. He testified that he became dissatisfied with Paramount in late 1995 because rental proceeds and account statements were arriving about three months late.

On April 23, 1996, Higgins sent a letter to Sky complaining that he had not received statements or rental proceeds for January, February, March and April 1996. Higgins testified that Sky did not respond to this letter. Higgins sent subsequent letters on May 21 and June 10, 1996. Higgins testified the Kerney called him on June 23, 1996 stating that he only recently had become aware of problems at Paramount. At Kerney's request, Higgins sent a letter by registered mail to Kerney itemizing the amounts owing on rental property. The letter was returned because Kerney refused receipt.

On July 23, 1996, Kerney sent a letter to Paramount's customers (including Higgins) stating that 18 property owners had not received proceed checks or account statements over several months. In the letter Kerney accused Sky of embezzling more than \$25,000 from Paramount's trust account. Kerney urged the 18 property owners to file a lawsuit against Sky.

Higgins testified that he never did receive the rental proceeds and calculated that Paramount owed him \$2,575.96.

Department Investigator Tim Alvine testified that he received this case from Investigator Dan Rupp in early 1998. Alvine testified that he served subpoenas on Kerney and Sky for documents pertaining to the Higgins, Costa and Bleakley complaints. Alvine testified that Kerney telephoned him and said that Sky had the documents and that Sky had locked him out of the Paramount office.

Alvine testified that he personally served a subpoena on Sky for the documents in March of 1998. He testified that Sky told him that Kerney had the documents, and further stated that he destroyed documents pertaining to the aforementioned complaints that were more than five years old. Alvine testified that he never did receive the documents itemized in the subpoenas.

Alvine also testified that he reviewed transcripts or notes from interviews between Rupp and Kerney. Alvine testified that Kerney told Rupp that his involvement with Paramount was minor, and that he only signed checks for Paramount and that he received \$500 per month. He also told Rupp that Sky was the person who managed Paramount on a day-to-day basis.

Alvine testified that other individuals also filed complaints against Paramount because they did not receive monthly rental proceeds or account statements.

**VIOLATIONS:** The Administrative Law Judge found that:

1. Respondents violated provisions of Title 32, Chapter 20 of the Arizona Revised Statutes within the meaning of A.R.S. § 32-2153(A)(3).
  2. Kerney's only interest in Paramount was the receipt of a \$500 monthly fee, and that Kerney failed to properly and reasonably supervise the activities of Sky and to properly assume the responsibility for the acts of Sky within the course of Sky's employment in violation of A.A.C. R4-28-303(G) and R4-28-303(H), and A.R.S. § 32-2153(A)(21).
  3. Kerney acted unreasonably in supervising Sky and in dealing with Higgins, Costa and Bleakley ("the Complainants"), and breached his fiduciary duty to, and failed to deal fairly with, the Complainants by failing to correct their problems with Paramount in violation of A.A.C. R4-28-1101(A) and A.R.S. § 32-2153(A)(21) and (22).
  4. Kerney and Paramount failed within a reasonable time to account for or remit the proceeds and statements owed to the Complainants in violation of A.R.S. § 32-2153(A)(9).
  5. Paramount violated the conditions and terms of Consent Order No. H-1310 because Sky deposited and withdrew funds from Paramount's trust account in violation of A.R.S. §§ 32-2153(A)(24) and 32-2153(B)(9).
  6. Paramount, through the actions or omissions of Sky and/or Kerney, failed or refused upon demand to produce documents in its possession concerning real estate activities or transactions involving Paramount and the Complainants for inspection by the Commissioner's representative. Paramount, through the actions or omissions of Kerney and/or Sky, failed to maintain a complete record of each transaction involving Paramount and the Complainants in violation of A.R.S. §§ 32-2153(A)(17) and 32-2153(A)(18).
  7. Paramount, through the actions or omissions of Sky and/or Kerney failed to keep all financial records pertaining to the Complainants for at least three years from the date of execution in violation of A.R.S. § 32-2175(B).
  8. Paramount failed to provide a final reimbursement of amounts owing to the Complainants and a final accounting regarding the financial status of the Complainants' rental properties upon termination of the property rental agreements in violation of A.R.S. § 32-2173(C).
- DISPOSITION:** Kerney shall pay a civil penalty in the amount of \$5,000. Paramount Realty, Inc. shall pay a civil penalty in the amount of \$8,000.

### LICENSES DENIED

#### H-1972

**Todd T. Sneed  
Tucson**

**DATE OF ORDER:** January 13, 1999

**FINDINGS OF FACT:** In August 1998, Petitioner

submitted an application for an original real estate salesperson's license in which he disclosed that he had been convicted of Unlawful Possession of a Narcotic Drug: Cocaine, in March 1995. Petitioner claimed in his disclosure that he had been convicted of a misdemeanor when, in fact, he had been convicted of a felony. Petitioner testified that he thought once he had completed probation, his conviction had been set aside and his civil rights had been restored, but admitted that he did not consult legal counsel or inquire as to the status of the conviction.

The Department denied the application, and Petitioner requested an Administrative Hearing.

At the hearing, it was determined that the State obtained a civil judgment against Petitioner for the unpaid balance of \$1,264 of a \$2,000 fine imposed when he was convicted. **VIOLATIONS:** Petitioner's conduct demonstrates he is not a person of good character within the meaning of A.R.S. § 32-2153(B)(7).

**DISPOSITION:** Petitioner's application denied.

#### H-1971

**John G. Schiller  
Mesa**

**DATE OF ORDER:** January 14, 1999

**FINDINGS OF FACT:** In October 1997, Petitioner submitted an application for an original real estate salesperson's license in which he disclosed he had been convicted of a felony in Washington State.

In November 1978, Petitioner was convicted of murdering his wife. He was sentenced to prison for a period of 12 years. In December 1982, Petitioner was released from prison. At the time of the murder, a physician diagnosed Petitioner as suffering from alcohol hallucinosis and stated that "it is obvious that the homicide was an alcohol involved incident."

In July 1998, the Department notified Petitioner that it was denying his license application, and Petitioner requested an administrative hearing. Petitioner testified that he joined Alcoholics Anonymous shortly after his arrest and has been sober for 20 years and has been a model citizen since his release from prison.

**VIOLATIONS:** Petitioner has been convicted of a felony within the meaning of A.R.S. § 32-2153(B)(2). Petitioner's actions involved violence against another person within the meaning of A.R.S. § 32-2153(B)(10). At the time of the murder, he was not a person of good character within the meaning of A.R.S. § 32-2153(B)(7).

**DISPOSITION:** In his Final Order, the Commissioner stated, "Although the petitioner has taken significant steps in his own behalf over the past 20 years, these steps cannot eliminate the Petitioner's felony conviction nor his violence against his spouse that resulted in her death. Petitioner's license application is denied."

**H-1959****Ian Chait  
Scottsdale**

DATE OF ORDER: February 1, 1999

FINDINGS OF FACT: In his application for an original real estate salesperson's license, Petitioner disclosed he had several criminal convictions for acts committed between 1985 and 1995. These included theft, possession of marijuana, possession of prohibited drugs and drug paraphernalia (felonies), misconduct with a weapon, reporting false information, driving on a suspended driver's license and misconduct with a weapon (a felony).

The Department denied the application. Petitioner requested an administrative hearing. At the hearing, Petitioner testified that he has successfully embarked upon and accomplished a change in his entire character and behavior. He consistently and unflinchingly attends Alcoholic Anonymous, Narcotics Anonymous and Cocaine Anonymous meetings.

DISPOSITION: In his Final Order, the Commissioner stated, "The Petitioner has made strong strides to demonstrate that he is overcoming the lifestyle that resulted in his convictions from 1985 through 1995. Nonetheless, three years of rehabilitation out of the past 12 years is not adequate to demonstrate that the Petitioner has forever placed his 10-year lifestyle behind him, especially considering the types of conduct in which the Petitioner participated. Furthermore, the Commissioner must also be mindful of his charge of public protection when he issues licenses." Application denied.

**CONSENT ORDERS****H-1975**

**In the matter of the real estate broker's license of Mitch E. Pearson and Mitch E. Pearson, Ltd., dba Daybreak Realty, and in the matter of the real estate salesperson's license of Cindy A. Pearson**  
**Peoria**

DATE OF ORDER: December 4, 1998

FINDINGS OF FACT: Mitch Pearson was issued an original real estate salesperson's license in March 1988. He was issued an original real estate broker's license in February 1996. That license expired on February 28, 1998. In August 1996, Mitch E. Pearson, Ltd., dba Daybreak Realty was issued a corporate broker's license with Mitch Pearson as the designated broker. That license expired on August 31, 1998.

In October 1997, Mitch Pearson consented to a three-month suspension of his broker's license and Daybreak's license for breach of fiduciary duty and dishonest dealings in an unrelated matter.

In his application for his original real estate broker's license, he failed to disclose the Consent Order or the fact that an adverse judgment had been entered against him.

Cindy Pearson was issued an original real estate salesperson's license in August 1990. In August 1996, she submitted an renewal application in which she failed to disclose a civil judgment against the Pearsons arising from the sale of property they owned in Phoenix.

VIOLATIONS: The Pearsons disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, and the Commissioner's Rules, in violation of A.R.S. § 32-2153(A)(3). As a result of their failure to disclose the civil judgment, they procured or attempted to procure licenses by fraud, misrepresentation or deceit by filing applications that were false or misleading, in violation of A.R.S. § 32-2153(B)(1). Their conduct shows they are not persons of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). They did not notify the Department within 10 days after the civil judgment was entered against them, in violation of A.A.C. R4-28-301(C). They failed to deal fairly with all parties to a transaction in violation of A.A.C. R4-28-1101(A).

DISPOSITION: Mitch Pearson's and Daybreak's real estate brokers' licenses are suspended for 18 months to commence on the date of this order. Upon completion of the period of suspension, Mitch Pearson must forfeit his broker's license and apply for a real estate salesperson's license.

Cindy Pearson's real estate salesperson's license is renewed, and suspended for three months to commence on the date of this order. She is to pay a civil penalty in the amount of \$1,000. The civil penalty must be paid in full prior to reinstatement of her license. She shall take 18 hours of approved real estate continuing education, in addition to hours required for license renewal, in the topics of real estate law, Commissioner's Rules and ethical issues.

**H-1935****George A. Pascale  
Glendale**

DATE OF ORDER: December 11, 1998

FINDINGS OF FACT: Respondent was issued an original real estate salesperson's license in August 1993. The license expires on August 31, 1999.

In September 1996, The Department of Veteran's Affairs received a complaint from Christine Wilson alleging that Pascale purchased a VA property using her name and social security number without her permission or knowledge. The property was a residence at 3120 N. Copenhagen Drive in Avondale.

Wilson and Pascale were acquaintances. She had given Pascale her social security number after he offered to provide her with a copy of her credit report. During the course of its investigation, the Department of Veteran's Affairs learned that Pascale purchased a second VA property, a residence at 3116 N. Copenhagen Drive, using Wilson's name.

On January 13, 1995, a trust deed for the

property at 3116 N. Copenhagen Drive was recorded at the Maricopa County Recorder's Office. The trust deed, dated December 20, 1994, bore the purported signature of Wilson.

Pascale signed Wilson's name to the Offer to Purchase and Contract for Sale, Trust Deed and Trust Deed Note in the amount of \$83,925 for the property at 3116 N. Copenhagen Drive without her written consent and notarized the signatures on the trust deed and trust deed notes.

On January 24, 1995, a Trust Deed for the property located at 3120 N. Copenhagen Drive was recorded at the Maricopa County Recorder's Office. The Trust Deed is dated December 20, 1994 and bears the purported signature of Wilson.

Pascale signed Wilson's name to the Offer to Purchase and Contract for Sale, Trust Deed and Trust Deed note in the amount of \$80,325 for the property at 3120 N. Copenhagen Drive without her written consent and notarized the signatures to the Trust Deed and Trust Deed Note.

On March 20, 1995, Pascale transferred title to both properties to himself by Quit Claim Deeds. Pascale signed Wilson's name to both Deeds without her written consent.

Pascale claimed homeowner interest payment deductions for the Copenhagen Drive properties on his 1995 and 1996 income tax returns and claimed the rents from the properties as revenue.

VIOLATIONS: As a result of the conduct and actions stated above, Pascale disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3). By signing Wilson's name to the documents without her written consent and notarizing the signatures, Pascale acted negligently in violation of A.R.S. § 32-2153(A)(22). By signing Wilson's name to the documents without her written consent and notarizing the signatures, Pascale dealt dishonestly, in violation of A.R.S. § 32-2153(B)(10). He failed to deal fairly with all parties to a transaction in violation of A.A.C. R4-28-1101(A).

DISPOSITION: Pascale's real estate salesperson's license is suspended for 12 months effective on the date of this order. He is to pay a civil penalty in the amount of \$3,000. He shall attend 12 hours of approved continuing education, in addition to hours required for license renewal.

**H-1974****Debra K. Hartman-Ramirez and Debbie's  
Rentals & Sales, Inc.****Nogales**

DATE OF ORDER: December 21, 1998

FINDINGS OF FACT: Hartman-Ramirez was issued an original real estate broker's license in February 1993. That license expired February 28, 1999. She was the designated broker for



Debbie's Rentals & Sales, Inc.

Debbie's Rentals & Sales, Inc., was issued an original real estate broker's license in April 1995. That license expires April 30, 1999. In May 1996, a Commissioner's Order was issued in the matter of Hartman-Ramirez and Debbie's Rentals wherein they were found to have violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20, and the Commissioner's Rules. Hartman-Ramirez failed to perform expeditiously as possible all acts required of her with respect to the management of property by failing to deposit funds into the proper account within three days and to perform according to the property management agreement.

Further, respondents deposited funds payable to another property management firm without authorization from the client. As a result of their actions, water service to the property had been shut off due to an unpaid water bill, and a mortgage payment for the property was not paid. Consequently, the unpaid debts caused the client to accumulate late fees.

Pursuant to the Commissioner's Order, Hartman-Ramirez and Debbie's Rentals were each assessed a civil penalty of \$1,000 and their licenses were suspended for one year. In April 1998, the Department received a complaint from Howard Shapiro alleging Respondents' misuse of funds in the Debbie's Rentals trust account. Shapiro owned several properties in Tucson which were managed by Debbie's Rentals. The complaint alleged:

- a. repeated delays in receiving rent proceeds from Debbie's Rentals;
- b. receiving checks returned for insufficient funds for rent on properties managed by Debbie's Rentals;
- c. that Hartman-Ramirez did not promptly transfer the property management records to a new management company;
- d. Hartman-Ramirez failed to notify the tenants about the management company change; and
- e. Hartman-Ramirez failed to deliver a copy of the property management contract to Shapiro. Shapiro terminated the management contract in March 1998.

In April 1998, the Department received a complaint from Ernest Lopez alleging misuse of funds by Respondents in the trust account for four properties he owned in Tucson. The complaint alleged that Respondents:

- a. failed to pay utility bills promptly, allowing \$7,423.81 in charges to accrue;
- b. paid past-due gas bills with an insufficient funds check;
- c. paid a plumber in the amount of \$1,065 with an insufficient funds check;
- d. failed to provide account statements to Lopez or Lopez' CPA as directed; and
- e. paid a water bill in the amount of \$935.48 with an insufficient funds check.

Lopez stated that Hartman-Ramirez would pay bills with her own money by using cash or cashier's checks which he believed unusual because there should have been adequate money in the trust account to cover the expenses. Lopez canceled the property management agreement with Debbie's Rentals in April 1998.

In May 1998, when Department Auditor Anthony Market attempted to serve a subpoena for documents at Debbie's Rentals, he discovered the office was abandoned. On the same day, he attempted to serve the subpoena at the home address of Hartman-Ramirez. He spoke with a woman who identified herself as Hartman-Ramirez's mother who refused to accept the subpoena.

On May 19, 1998, the Department canceled the real estate broker's license of Debbie's Rentals for abandonment of the business location. Since that cancellation, Hartman-Ramirez' license has been on inactive status.

On May 20, 1998, Market and Department Investigator Anita Pennick served a subpoena on Hartman-Ramirez who provided Market and Pennick with records from 1996, 1997 and 1998. At that time, Hartman-Ramirez advised Market and Pennick that the trust account had a \$20,000 shortage. She admitted using funds belonging to one client to pay the debts of other clients. Hartman-Ramirez further stated she would no longer be in the real estate business. A Department auditor was unable to determine the amounts owed to owners and tenants or the exact amount of the trust account shortage. Hartman-Ramirez told the auditor that the shortage was approximately \$25,000. Subsequently, the Department received complaints from eight other clients of Debbie's Rentals alleging a variety of problems, most of them related to the payment of funds on behalf of the clients and failure to remit rent proceeds.

In June 1998, Hartman-Ramirez met with Department personnel and revealed that she:

- a. did not keep detailed records of transactions handled by Respondents for some time;
- b. Used trust account funds to cover owners' liabilities even when those owners did not have sufficient proceeds or credit balances to cover the expenses;
- c. Paid owners' bills with her money and used cashier's checks from the trust account;
- d. Transferred funds back and forth between Debbie's Rentals' operating account and the trust account to pay commissions or for reimbursement for bills she had paid on behalf of owners from her own funds; and
- e. Knew the trust account was overdrawn at times for various reasons.

As of August 7, 1998, the Department estimated the trust account shortage to be between \$35,906 and \$49,700.

**VIOLATIONS:** Respondents used money entrusted to them for other than its intended

purpose, in violation of A.R.S. § 32-2151(B)(1). Respondents violated their fiduciary duties to their clients, and did not deal fairly with all parties to a transaction within the meaning of A.A.C. R4-28-1101(A), in violation of A.R.S. § 32-2153(A)(3). As a result of the conduct and actions referenced above, Respondents failed, within a reasonable period of time, to account for or to remit any monies which belong to others, in violation of A.R.S. § 32-2153(A)(9). Hartman-Ramirez failed to keep trust account or other records of funds deposited, in violation of A.R.S. § 32-2153(A)(15). Respondents commingled with their own, funds entrusted to them by property owners and tenants, or converted those monies for their own use, in violation of A.R.S. § 32-2153(A)(16). Hartman-Ramirez failed to maintain a complete record of each transaction, in violation of A.R.S. § 32-2153(A)(18). As a result of the conduct and actions referenced above, Hartman-Ramirez demonstrated negligence in the conduct of real estate and as designated broker for Debbie's Rentals, in violation of A.R.S. § 32-2153(A)(22). Hartman-Ramirez has demonstrated incompetence to perform any duty or requirement of a licensee in violation of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(B)(8). Respondents, upon termination of property management agreements, failed to immediately provide the owners with originals or copies of all rental agreements and related documents in their possession for current and previous tenants, in violation of A.R.S. § 32-2173(B)(1). Respondents, upon termination of property management agreements, failed to immediately provide the owners with a final accounting of the properties' financial status, in violation of A.R.S. § 32-2173(C).

**DISPOSITION:** The real estate broker's licenses of Respondents are revoked. Respondents shall not reapply for an Arizona real estate license for five years or more from the date of entry of this Order. Respondents jointly and severally are assessed a civil penalty in the amount of \$8,000.

#### H-1964

**Neil B. Sherman**  
**Phoenix**

**DATE OF ORDER:** February 1, 1999

**FINDINGS OF FACT:** In August 1997, Petitioner submitted an original application for a real estate broker's license in which he failed to disclose he had been charged with Theft, a class 3 felony. On November 10, 1997, he was convicted of misdemeanor theft and was placed on three years probation. He will remain on supervised probation until November 10, 2000. **VIOLATIONS:** Petitioner procured a license by filing an application which was false or misleading in violation of A.R.S. § 32-2153(B)(1). He failed to notify the Commissioner in writing of his conviction with-



in 10 days and as a result disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Petitioner's real estate broker's license is suspended until his term of probation is terminated, but for not less than six months from the date of this order. Petitioner to pay a civil penalty in the amount of \$4000. Petitioner shall attend 12 hours of approved continuing education in addition to hours required for renewal within 60 days of the entry of this order.

#### H-1986

**Roland Reese Banks, III**

**Mesa**

DATE OF ORDER: February 16, 1999

FINDINGS OF FACT: In April 1998 Respondent filed an original application for a real estate salesperson's license in which he failed to disclose two misdemeanor convictions for issuing fraudulent checks. He provided statements to the Department in which he attested that he did not disclose the convictions because he was unaware they had become a permanent part of his

record.

VIOLATIONS: By failing to disclose the convictions, Respondent procured or attempted to procure a license by fraud, misrepresentation or deceit, or by filing a license application that was false or misleading, within the meaning of A.R.S. § 32-2153(B)(1). Respondent has shown he is not a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondent's real estate salesperson's license is suspended for 30 days as of the date of this order. Respondent to pay a civil penalty in the amount of \$500.

#### H-1996

**Stephen L. Erickson**

**Lincoln, NE**

DATE OF ORDER: February 23, 1999

FINDINGS OF FACT: Respondent filed an original application for a real estate broker's license in which he failed to disclose two convictions for violation of protection order, disturbing the peace, obstructing a peace officer and two DUI convictions, all in 1997.

VIOLATIONS: Respondent has been convicted of a felony or of any crime of forgery, theft, extortion, conspiracy to defraud, a crime of moral turpitude or any other like offense within the meaning of A.R.S. § 32-2153(B)(2).

DISPOSITION: Respondent's real estate broker's license is revoked. Respondent to pay a civil penalty in the amount of \$1,000.

#### H-1987

**M. Allan Domb**

**Scottsdale**

DATE OF ORDER: February 24, 1999

FINDINGS OF FACT: Respondent filed an application for a real estate broker's license in which he failed to disclose a 1981 conviction in Pennsylvania for disorderly conduct for which he paid a \$300 fine. He attested his failure to disclose the conviction was an oversight.

VIOLATIONS: Respondent procured or attempted to procure a license by fraud, misrepresentation or deceit, or filed a license application that was false or misleading, within the meaning of A.R.S. § 32-2153(B)(1).

DISPOSITION: Respondent to pay a civil penalty in the amount of \$500.

## Are document fees legal?

*Continued from page 2*

(1976). In *Morley*, the court discussed the unauthorized practice of law as it relates to real estate brokers. The court, however, was concerned only about the standard of care of a broker, and not the propriety of whether or not a broker can legally assist another person in the preparation of real estate documents.

**When is a real estate licensee "practicing real estate"?**

The practice of law and the practice of real estate significantly overlap. As noted above, a real estate licensee is allowed to do both, but cannot "practice law" if not actually representing a party in a real estate transaction.

A person is required to hold a real estate license if that person performs any of the activities falling within the definition of "real estate broker" as defined by A.R.S. § 32-2101(46). That statute requires a person to be licensed if that person, for another and for compensation, performs any of the activities listed in that statute, including but not limited to the following types of activity:

- Sells or offers to sell, exchange, purchase or rent real estate;
- Negotiates, or attempts to negotiate, the sale, exchange, purchase, or rental of real estate; or

- Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, or rental of real estate.

Although there is no bright line test as to what type of activities require a real estate license, the preparation of transactional documents easily falls within the scope of activities for which a real estate license is required. Therefore, there are two additional issues to consider, as discussed below.

**Can the real estate salesperson or associate broker accept compensation directly from a "client"?**

Pursuant to A.R.S. § 32-2155(A), a salesperson (or associate broker) shall accept "employment and compensation" as a licensee only from the broker with whom the salesperson (or associate broker) is licensed. If the licensee is performing real estate activities for which a license is required, then that licensee must be paid by his or her designated or employing broker. Thus, if a salesperson accepts money "on the side" directly from a client for anything relating to a real estate activity, then that salesperson has violated the real estate statutes by not having required such fees to be paid through his or her broker. Thus an licensee who accepts compensation directly from a client for preparing a form not only commits the unauthorized practice of law, he or she also violates A.R.S. § 32-2155 (A).

**What about the broker's obligation to supervise the real estate licensee?**

Even if a salesperson is allowed to prepare forms incident to a transaction, we must nonetheless consider the duty imposed on the salesperson's broker to supervise such activities. The Commissioner's Rules require that the designated or employing broker shall exercise "actual supervision" over the salespersons and associate brokers, and shall assume responsibility for the acts of associate brokers, salespersons and other employees acting within the course of their employment. R4-28-303(J) and (K). Similarly, the Arizona statutes provide that it is grounds for suspension or revocation of a license if a designated or employing broker fails to "exercise reasonable supervision" over the activities of salespersons or associate brokers under the broker's employment. A.R.S. § 32-2153(A) (21). If a licensee charges a party for filling out a real estate contract in a deal in which the licensee purports not to represent a party, it appears that the licensee is actually performing a real estate activity. Thus the licensee is acting under the scope of employment as a licensee, and the broker remains liable to supervise the licensee in relation to that transaction.

*Dan Kloberdanz is a partner in the law firm of Stoops & Kloberdanz, PLC, and is a State Bar Certified Real Estate Specialist.*

## New Rules

*Continued from page 1*

month late fee, not to exceed \$60. Brokers will be charged a \$20-per-month late fee, not to exceed \$120.

### Receipt of Applications by the Department

All documents shall be considered filed on the date received by the Department. An original or renewal application postmarked on or before the end of the application or renewal deadline shall be considered timely. Under the old Rule, the Department had to actually receive the application on or before the end of the application or renewal deadline. Postmarks were not considered in determining whether the deadline had been met.

### Licensing Time Frames

The Department is now required to issue or deny a license within certain overall time-frames after receipt of an application. An "administrative completeness review time-frame

begins on the date the Department receives an application. The Department will notify the applicant in writing within the administrative completeness review time-frame whether the application is incomplete. The notice shall specify what information is missing. If the Department does not provide notice to the applicant, the license application is considered complete.

An applicant with an incomplete license application shall supply the missing information within the completion request period established by the Rule. The administrative completeness review time-frame is suspended from the date the Department mails the notice of missing information to the applicant until the date the Department receives the information.

If the applicant fails to submit the missing information before expiration of the completion request period, the Department shall close the file, unless the applicant requests an extension. An applicant whose file has been closed may reapply by submitting a new application.

A substantive review time-frame established by the Rule begins after the application is administratively complete. If the Department makes a comprehensive written request for additional information, the applicant shall submit the additional information identified by the request within an "additional information period" defined by the Rule. This time-frame is suspended from the date the Department mails the request until the information is received by the Department. If the applicant fails to provide the information identified in the written request, the Department shall consider the application withdrawn.

If an application is denied, the Department sends the applicant written notice explaining the reason for the denial with citations to supporting statutes or rules, the applicant's right to seek a fair hearing, and the time period for appealing the denial.

Specific details about these time-frames are contained in the new Rule, A.A.C. R4-28-103.

*Continued on next page*

## Courts uphold ADRE action in largest subdivision case ever to come before the Department

The State Supreme Court recently declined to review an Appellate Court decision which upheld the Department's action in the largest illegal subdivision case ever to come before the Department.

Because the Court declined to review the decision, the developers will have to pay substantial civil penalties, obtain all documents required for a legal subdivision, bring all roads in the subdivision up to county standards and to petition Yavapai County to accept the roads for perpetual maintenance. Several licenses are suspended for two years.

The following is an article written shortly after the Appellate Court decision by Phoenix attorney Kathleen D. Masters. It appeared in the October 1998 edition of the Arizona Journal of Real Estate and Business and is reprinted here with permission. [Ed.]

## Beware 'acting in concert' to avoid subdivision laws

*By Kathleen Masters*

The Arizona Court of Appeals, Division 1, recently decided in a consolidated opinion three related cases in which Defendants were charged with "acting in concert" to avoid the subdivision laws. Kenneth R. Siler and Sunburst Realty, et al, 98 AJ A.A.R. 374 (1998). For brevity, only

one of these cases will be discussed. The issues in all three cases are the same.

The land involved in the three cases is located in a wooded area outside Prescott, Arizona. During the relevant time periods, the division of land "for the purpose of sale or lease...into four or more lots, parcels or

fractional interests: required compliance with the Arizona Subdivision Laws. A.R.S. § 32-2101, *et seq*. These statutes require a seller to file a Notice of Intention to Subdivide Lands and to obtain a public report authorizing sales of subdivided lots or parcels. Defendants in these three cases did neither.

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# B.H. Davidson retires from Real Estate Advisory Board after 12 years of service

Sedona real estate broker B.H. Davidson has retired from the Arizona Real Estate Advisory Board after serving two six-year terms.

In a letter addressed to Commissioner Jerry Holt, Mr. Davidson wrote, "Under your leadership the Department has come to the forefront of the best in the United States. This is a great credit to you and all the wonderful staff that have worked so hard to achieve such high standards. I am honored to have served with such a dedicated group of professionals and on such a fine group of Advisory Board Members."

Commissioner Holt said that Mr. Davidson's service to the State of Arizona has been exemplary. "He has set a high standard that will shine as a beacon for all to emulate."

During World War II, Mr. Davidson served as a B-17 aircraft commander with the 379th Bomb Group of the Eighth Air Force in Europe. He flew 25 combat missions and 200 combat hours and was one of the few B-17 aircraft commanders to complete 25 missions without harm to any of his crew members.

He participated in all the air battles during the famous "Big Week" in February, 1944 in an all-out effort to destroy the German Air Force prior to the Normandy invasion.

In April 1944, he became a B-17 Instructor Pilot at Galveston AFB, Texas, and Petersen Field, Colorado.

He began a tour with the Strategic Air Command (SAC) in May 1946. In 1964, he was transferred to Vietnam where he did much of the Air Force planning for the expansion of Air Force



*Real Estate Advisory Board member B.H. Davidson (left) is presented with a commendation from Governor Jane Dee Hull by Commissioner Jerry Holt.*

activities in Vietnam and Thailand. For his outstanding service in Vietnam he received the Legion of Merit. In 1965 he returned to SAC serving as Deputy Commander for Maintenance, 93rd Bomb Wing, at Castle AFB in California.

In addition to the Legion of Merit, he was awarded the Distinguished Flying Cross, the Air Medal with three oak leaf clusters and the Air Force Commendation Medal with two oak leaf clusters.

He retired from the Air Force in November 1972 after serving as Deputy

Chief of Staff Logistics at SAC headquarters at March AFB in California.

He was appointed to his first six-year term as a member of the Real Estate Advisory Board on March 14, 1987 by Governor Evan Mecham. He was reappointed by Governor Fife Symington in 1993. That term expired on January 31, 1999.

In 1977, Mr. Davidson obtained an Arizona real estate salesperson's license and became a broker in 1988. He is the owner and designated broker for B.H. Davidson Realty in Sedona.

## Advertising

The Substantive Policy Statement regarding the use of "team" or "group" in advertising has been made a rule. A real estate salesperson or broker may use the terms to advertise and promote real estate services if those terms do not constitute the use of a trade or d.b.a. name, and all of the following are true:

1. The team or group is comprised of real estate salespersons or brokers,
2. The team or group members are employed by the same employing

broker,

3. The designated broker maintains and files with the Department a current list of all members of each group or team in the broker's employ, and

4. The advertising otherwise complies with statutes and rules.

The use of electronic media, such as the Internet or web-site technology, which targets Arizona residents with the offering of a property interest, constitutes the dissemination of advertising as defined in A.R.S. § 32-2101 (2).

The new Rules may be ob-

tained in Adobe Acrobat Format (PDF) from the Department's Web site at [www.adre.org/flashpage.html](http://www.adre.org/flashpage.html), or a copy may be purchased from the Department's Phoenix or Tucson office.

The new Rules will also be published in the 1999 Arizona Real Estate Law Book which will be available in two or three months.

Soon, the Rules will also be available as part of the Arizona Real Estate Law Book On-Line Edition which can be accessed from the ADRE Web site at [www.adre.org](http://www.adre.org).



## Acting in concert

*Continued from page 10*

This article will discuss the Defendants which the Court of Appeals called the "Mullen Group." Joseph Mullen, Jr. and John Franolich formed a partnership called JLJ, Ltd. for the purpose of buying land near Prescott. Mullen and Franolich used their partnership to buy land, divide the land between themselves and further divide that land into a total of six lots. Within this same time, Mullen purchased a contiguous parcel and divided it into three lots. Mullen later bought a ten-acre parcel in the same area (but not contiguous to either of the first two parcels). The escrow instructions for the sale of this 10-acre parcel provided that it could be released in two-acre units. Mullen then ordered a survey splitting this ten-acre parcel into five two-acre lots. He sold two lots and conveyed the remainder to Michael and Marie Sahady. Michael is Mullen's step-son. The Sahadys then entered a contract to sell two lots and retained one lot.

In the same relevant time period, Mullen purchased another eight-acre parcel, not contiguous to any of the previously mentioned parcels, but nearby. The escrow instructions for this parcel provided again for two-acre lot releases, and Mullen had a surveyor prepare legal descriptions for four lots. Mullen then transferred the property to the Mullen Family Trust.

Bonnie Weeks (Mullen's daughter) and Mr. and Mrs. Sahady are among the trust beneficiaries. Mullen also transferred half the parcel to Mr. and Mrs. Sahady, who sold a two-acre lot and listed the other lot for sale. The trust had two lots surveyed on its four acres and listed one for sale. Also during this time period, Mullen purchased another ten acres in the same area and had it surveyed to divide the land into five lots. He transferred six acres in this parcel to Bonnie Weekes.

It does not take a mathematical genius to determine that the result of all these transactions was to create far more than the four or more "lots, parcels or fractional interests" which triggered the obligation to comply with the Arizona subdivision laws at that time.

At the hearing conducted by the Real Estate Department Administrative Law Judge, Prescott and Yavapai County officials testified that the nature of the land subdivided has mostly dirt and rock roads which did not meet

country standards and were virtually unusable by fire trucks; no fire hydrants or water lines existed; the land was heavily forested and steeply graded; these conditions posed a very serious fire risk for the people living in the area as well as neighboring residents and firefighters. For these reasons, the Real Estate Department not only suspended Mr. Sadahy's real estate license and imposed civil penalties on the entire Mullen Group, but the Department also ordered Mullen, Franolich and JLJ Partnership to obtain the documents necessary for a lawful subdivision, to bring all roads up to county standards and to petition Yavapai County to accept the roads for perpetual maintenance.

In addition to appealing the monetary penalties and suspension of real estate salesperson's license, the Mullen Group argued that it should not be required to comply with the law to create a legal subdivision, to bring the roads up to county standards and to petition Yavapai County for their acceptance and maintenance.

The Court reasoned that if the Mullen Group had complied with the subdivision laws at the beginning of these transactions, it would have been required to insure installation of adequate roads and utilities. The Court stated that the Real Estate Department's Order, therefore, imposed no greater burden on the Mullen Group than would have been imposed by the relevant subdivision statutes applicable at the time of these transactions.

The Mullen Group also argued to the Court of Appeals that its members did not intend to illegally subdivide land and, therefore, the fines and suspension of real estate license should be overturned. The Mullen Group contended that no member consciously agreed or knowingly intended to act in concert with other group members to violate the law and that no member of the group sold more than three contiguous parcels.

The Court of Appeals refused to overturn the fines and license suspension citing A.R.S. § 32-2181 (D) which provides: "it shall be unlawful for a person or group of persons acting in concert to attempt to avoid the provisions of this article by acting in concert to divide a parcel of land by using a series of owners or conveyances, or by any other method which ultimately results in the division of such land into a subdivision." In doing so, the Court agreed with the Real Estate Depart-

ment that the phrase "to act in concert" means only that parties must agree to act together to divide their land. They do not need to agree to violate the law, and that an agreement can be inferred from the parties' actions.

The Court of Appeals went on to say that no specific intent to violate the law is required, because such a strict requirement would effectively gut the statute. The Court found that substantial evidence existed to support the findings of the Real Estate Department that the Mullen Group acted together to avoid the relevant statutes by using a series of owners and conveyances to create subdivision of four or more lots.

Another of the Mullen Group's arguments was that to create a subdivision, the selling entity must sell more than three contiguous lots at the time of these transactions. The Court of Appeals disagreed, pointing out that the subdivision statutes as written at the time of the Mullen Group's transactions defined a subdivision as land "divided or proposed to be divided for the purpose of sale...whether immediate or future, into four or more lots, parcels, or fractional interests." A.R.S. § 32-2101 (41). Clearly, the actions of the Mullen Group from the first to the last transaction is described by this statute as the creation of a subdivision. The Court of Appeals also pointed out that the statute does not state that the lots must be contiguous. The Court quoted A.R.S. § 32-2101 (11) which defines a subdivision as "lands divided or proposed to be divided as part of a common promotional plan" and found that the parties in the Mullen Group did offer their land for sale as part of a common promotional scheme in that they bought land to be divided for sale into four or more lots (ultimately) and through conveyances among themselves created four or more lots. The Court stated that once this result had been established, "the contiguous nature of the individual lots became irrelevant."

Upon first reading, the Court statement that "the contiguous nature of the individual lots became irrelevant" might make sellers of land fearful that they would be obligated to comply with the subdivision laws no matter how far apart their parcels were if they ultimately divided distant parcels into a total of six or more lots, which recent amendments to the subdivision statutes

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establishes as the trigger for application of the subdivision law. However, a more careful reading of this decisions shows that the Court of Appeals actually was focusing on a "common promotional scheme" of the various members of the Mullen Group, not whether or not all parcels involved in their transactions were contiguous. Therefore, it is unlikely that the Courts will find violation of the subdivision laws if the same or related entities divide six or more parcels that cannot rationally be considered in the same area into a total of six or more lots.

Obviously, however, we cannot know this for certain until the Arizona Courts decide a case in which whether the contiguous or noncontiguous nature of the divided property is a major issue and not merely a "side issue," with the main issue being the "common promotional scheme," as was the case here. To be perfectly safe, any seller contemplating dividing land, wherever located, into six or more units should seek an opinion from the Real Estate Department as to whether the subdivision laws will apply to his actions.

Often the expense and delay involved in seeking such an opinion may lead the seller to conclude that in his situation the risk of being required to comply with the subdivision laws is slight enough that he can go ahead without an opinion from the Real Estate

## Richard C. Allen appointed to Real Estate Advisory Board

Phoenix real estate broker Richard C. Allen has been appointed to the Arizona Real Estate Advisory Board for a six-year term by Governor Jane Dee Hull.

He replaces B.H. Davidson who chose not to serve for a third term.

Mr. Allen is the Chairman of Allen Tenant Services, Inc. The company, founded in 1983, works with office, industrial and medical building tenants helping them with lease problems, renewal of their leases and in finding new space.

Allen Tenant Services was the first company in the nation to exclusively represent tenants and buyers of commercial real estate.

Mr. Allen is a graduate of the University of Michigan where he received an engineering degree.

From 1962 to 1983 he was President and Chairman of Murdock Management Company headquartered



*Richard C. Allen*

in Phoenix. The company managed commercial buildings as well as insurance companies, pension funds, investment trusts and individuals. With offices in 16 cities, it employed more than 400 people and managed more than 12 million square feet of commercial space.

Department. That is obviously up to each individual seller to weight the pros and cons of going ahead more expeditiously without waiting for such an opinion versus being found after the fact to have violated the subdivision

laws.

*Kathleen D. Masters is a Phoenix attorney whose practice emphasizes real estate and related law. She can be contacted at 602/277-4441, extension 273.*

## ADEQ redesigns Web site; new information includes maps and data on Superfund, WQARF sites

Web site redesign recently completed by the Arizona Department of Environmental Quality has made the site far more useful to real estate professionals and home buyers and sellers.

The site can be found at

[www.adeq.state.az.us/waste/sps/index.htm](http://www.adeq.state.az.us/waste/sps/index.htm) and contains detailed information about Superfund and WQARF sites throughout the state.

Maps depicting Superfund and WQARF sites in Phoenix and Tucson

show the boundaries of each site and the estimated boundaries of ground water contamination. Text describes the history of each site, the type of contamination found there and information about remediation efforts.

## New Rules eliminate 13 Substantive Policy Statements

Revisions to the Commissioner's Rules have enabled us to repeal 13 Substantial Policy Statements.

They are:

- No. 1. Activity Affidavit/Unlicensed Activity Statement
- No. 2. Administrative Severance of Licensees
- No. 5. Branch Manager Authority
- No. 7. Continuing Education Waiver

- No. 12. Evaluating Out-of-State Education for Original Arizona Licensure
- No. 16. Professional Corporation: Licenses; Requirements
- No. 17. Professional Limited Liability Companies; Licenses; Requirements
- No. 18. Maximum of Nine Classroom Hours Accredited Per Day
- No. 20. Non-Resident Brokers Checklist of Requirements
- No. 23. Qualifications for Approval as

- Real Estate Instructor
- No. 32. Limited Liability Companies: Licenses; Requirements
- No. 35. "Team" and "Group" Advertising: Permissible Advertising
- No. 38. Advertising and Promotions; use of "Free"

The remaining Statements will be renumbered and will be posted in the Table of Contents on the Department's Web site soon at [www.adre.org](http://www.adre.org).

## Counterfeit score sheet nets applicant a month in jail

Yavapai County resident Kati Marie Wesolowski was sentenced to one month in jail and placed on probation for a year by a Maricopa County Superior Court Judge after submitting a counterfeit document showing she had passed the State real estate salesperson's examination.

When she submitted her application for a license, she said she did not have the original "score report" from Assessment Systems, Inc., the company that administers the real estate examination. Instead, she produced what she said was a photocopy of the report. She explained that she had photocopied her score report for her records, then forgot to take the original out of the photocopy machine. When she returned

later, she said, the original could not be found.

Security features built into the score report revealed it was not a photocopy of the original document. Instead, someone probably used a scanner and computer in an attempt to combine the photo ID portion of Wesolowski's failing report with a portion of another person's passing score report and make it look like a photocopy. It didn't work.

"The security features are very sophisticated," said the Department's Education and Licensing Director, John Bechtold. "They are virtually impossible to defeat and a counterfeit score report is easy to detect."

## Advisory Board

*Continued from page 1*

recommendations on specific questions or proposals as requested by the Commissioner."

**Board member Gary Lee appointed to third term**

Real estate broker Gary Lee has been appointed to another six-year term on the Advisory board by Governor Jane

Dee Hull.

The owner and designated broker of Commercial Brokers in Yuma, Mr. Lee was first appointed to the Board in 1987 by Governor Evan Mecham.

Before moving to Arizona, he was the owner of and broker for a large real estate firm in Fremont, Calif., and holds an active broker's license in both states. He is a member of the Yuma County Board of Realtors® and the National Association of Realtors®.

## How to contact ADRE by phone, fax and modem

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(602) 468-1414

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Education & Licensing 345  
Subdivisions 400  
Public Information Office 168

### Division Fax Numbers

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### WORLD WIDE WEB

[www.adre.org](http://www.adre.org)

### E-MAIL

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## Free computer program may identify Y2K problems in your PC

A DOS program available free of charge from [www.nstl.com](http://www.nstl.com) will check your computer hardware for Y2K compliance.

You may go to [www.nstl.com](http://www.nstl.com) and click on YMARK2000 to download the 2000.exe file into your c:\temp folder. Restart in MS-DOS mode and type

c:\temp\2000.exe to start the program. The program checks your hardware's ability to recognize the year 2000 and handle leap years.

Read the instructions on the NSTL web site to interpret errors identified by the program.

Kevin Goode, the Department's

System Administrator, tested the program. "It does a pretty good job of testing for Y2K problems in MS-DOS and Windows computers—even a bit better than the one I've been using. It's worth the download."

The Department's computer system has proven to be Y2K compliant.

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